Supreme Court, U.S.
FILED

07-473 JUL 12 2007

OFFICE OF THE CLERK

No. _____.

IN THE
SUPREME COURT OF THE UNITED STATES

Daro Weilburg – Petitioner

vs.

Jesse Montgomery – Respondent

ON A PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

SEVENTH CIRCUIT

DARO WEILBURG
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QUESTIONS PRESENTED

1. CAN THE ILLINOIS STATE COURTS; THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS; AND, THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HOLD THAT A CRIMINAL DEFENDANT WAS APPRISED OF HIS RIGHT TO APPEAL PURSUANT TO ILCS SUPREME COURT RULE 605, WHEN NO DEFENDANT AND NO DEFENSE COUNSEL WERE PRESENT FOR THE SENTENCING HEARING HELD IN ABSENTIA?

2. CAN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS AND, THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HOLD THAT THE ONE (1) YEAR TIME LIMITATION DEPICTED IN THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY

ACT, (AEDPA), (EFFECTIVE APRIL 26, 1996, USHERED IN UNDER SECTION 2244(d) TITLE 28 OF THE UNITED STATES CODE) TAKES EFFECT WHEN NO DEFENDANT OR DEFENSE COUNSEL IS PRESENT AT THE FINAL STAGE OF THE CRIMINAL PROCESS (THE SENTENCING HEARING) TO HEAR THE RIGHT TO APPEAL OR SECURE THE RIGHT TO APPEAL?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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(a) "...The absent defendant must be represented by either retained or appointed counsel...."

(e) "...Upon his return the absent defendant may challenge either the trial or sentence held in absentia by motion..."

(g) " the absent defendant may appeal any adverse ruling on his motion to vacate either the trial or sentence held in absentia..." .....

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

[X] For cases from federal courts:

[X] There was no opinion of the United States Court of Appeals. That court refused to grant the Certificate of Appealability. Appendix C.

[X] The opinion of the United States District Court appears at Appendix A,B to the petition and that Court denied the Certificate of Appealability and is unpublished.

[X] For cases from state courts:

[X] There was no opinion from the highest state court the Illinois Supreme Court as that Court refused to review the merits and denied the Petition for Leave to Appeal (PLA) on May 24, 2006.

[X] There was no opinion from the Illinois State Appellate court for the 2nd District because that court dismissed the appeal on December 12, 2005.

JURISDICTION

[X] For cases from federal courts:

[X] The date on which the United States Court of Appeals decided my case was April 25, 2007, that Court refused to grant the Certificate of Appealabilty.

[X] A timely notice for rehearing en banc was filed and denied by the Court on June 11, 2007.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1)

[X] For cases from state courts:
The date on which the highest state court decided my case was May 24, 2006. That court refused to allow the Petition for Leave to Appeal and provided no opinion.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. The Right to counsel at all critical stages of the criminal process. Const. Amend 5, 6, 8 and 14;

2. The Right to Counsel for the Bond Forfeiture Hearing held on Nov. 18, 1999, Const. Amend. 5, 6, 8 and 14;

3. The Right to counsel at sentencing *in absentia* held on Nov. 19, 1999. Const. Amend. 5, 6, 8 and 14;

4. The Right to entertain equal protection of the Illinois statutory provision at 725 ILCS 5/115-4.1(a) to be represented at any formal Criminal hearing conducted in the state courts, by the state courts. Const. Amend 5, 8 and 14;

5. The Right to entertain equal protection of the Illinois Statutory provision at 725 ILCS 5/115-4.1(g) to appeal from a lower Court's adverse ruling on a Section 4.1(e) Motion to vacate the trial or sentencing held *in absentia*. Const. Amend. 5, 8, 14;

6. The Constitutional Right to file a habeas corpus petition on the above issues and have the 7th Circuit U.S. Court of Appeals issue a Certificate of Appealability for the adverse ruling from the U.S. District Court for the Central District of Illinois regarding issues of a Constitutional magnitude.

STATEMENT OF CASE

On August 29, 1997, Petitioner was found guilty of the crime of Theft, a Class 2 felony, by a jury in the matter of People v. Weilburg, 94-CF-2420, within the Winnebago County Court of the 17th Judicial Circuit of Illinois.

On September 3, 1999, Petitioner appeared and informed the Court that he desired counsel to represent him for sentencing. Petitioner had repeatedly requested the Court to voir dire a juror who had a close association with the Petitioner and refused to divulge the association at the jury selection voir dire.

Petitioner also presented that (6) invoices that were presented at trial to substantiate the alleged amount taken in the theft were made out to a Rockford, Illinois street address that did not exist and that Petitioner had worked with a juror. The Court adamantly refused to grant a new trial in spite of prior precedents to the contrary. The Court set sentencing for September 30, 1999.

On September 30, 1999, the day of the scheduled sentencing, Petitioner filed a pleading informing the Court that he would not appear and that he was leaving the jurisdiction. "No citizen of the United States can be deprived of life, liberty or the pursuit of happiness absent **due process of law**."

Petitioner did not receive any further notices from the Court or the State's Attorneys Office of any subsequent hearings at his provided address.

On September 30, 1999, the Court set the Bond Forfeiture Hearing for November 18, 1999, and the Sentencing Heraing for November 19, 1999. The Assistant

State's Attorney requested that the Court appoint counsel to represent Petitioner and the Court refused. (725 ILCS 5/115-4.1(a))

On November 18, 1999, the Court held the Bond Forfeiture Hearing *in absentia* and without counsel to represent Petitioner. On November 19, 1999, the Court held the Sentencing Hearing, *in absentia* and without counsel to represent Petitioner and Sentenced Petitioner to the maximum term of imprisonment of 7 years.

On December 13, 2000, the State's Attorneys Office secured an indictment for the alleged offense of violation of bail bond against Petitioner wherein the Assistant State's Attorney who prosecuted the theft case became the witness and only witness against Petitioner for the charge of Violation of Bond. She testified falsely before that panel.

On July 21, 2003, Petitioner was arrested in Arizona and extradited back to Illinois on October 1, 2003.

On December 9, 2003, Petitioner was found guilty of the violation of bail bond by a jury in the matter of People v. Weilburg, 00-CF-3174. Petitioner was sentenced to 30 months consecutive to the 7 year term imposed in 94-CF-2420 on August 6, 2004.

On or about October 10, 2003, Petitioner filed a Motion to Vacate or in the alternative Motion for new trial pursuant to 725 ILCS 5/115-4.1(e) in 94-CF-2420.

On or about October 26, 2004, the Motion for new trial was denied and Petitioner filed a timely notice of appeal 725 ILCS 5/115-4.1(g). The State Appellate Court dismissed the appeal and the State Supreme Court denied the PLA.

The Petitioner then filed a Petition for writ of habeas corpus in the U.S. District Court for the central District of Illinois and that Court dismissed the Appeal pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA).

Petitioner appealed to the U.S. Circuit Court of Appeals for the 7th Circuit and that Court affirmed the decision of the lower District Court that the Petition for writ of habeas corpus was untimely.

REASONS TO GRANT WRIT: PETITIONER CONTENDS THAT THE ILLINOIS STATE COURTS, THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS AND THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT CANNOT HOLD THAT PETITIONER WAS APPRISED OF HIS RIGHT TO APPEAL PURSUANT TO ILCS SUPREME COURT RULE 605 AT THE SENTENCING *IN ABSENTIA* HELD ON NOVEMBER 19, 1999 BECAUSE PETITIONER WAS NOT REPRESENTED BY COUNSEL.

1. The Petitioner notified the Winnebago County, Illinois Court for the 17th Judicial Circuit that he desired counsel to represent him for the sentencing hearing scheduled for September 30, 1999, he did so on September 3, 1999.

2. Illinois Statutory Law at 725 ILCS 5/115-4.1(a) prohibits any criminal defendant from being placed on trial or sentenced without either retained or appointed counsel.

3. Petitioner was not present for the ex-parte bond forfeiture hearing held on November 18, 1999, nor was he represented by counsel at that hearing. His bond was forfeited by the court.

4. Petitioner was not present for the sentencing hearing held on November 19, 1999, nor was he represented by counsel, the Court sentenced him to the maximum term of imprisonment that could be imposed by law.

5. Petitioner was not present on November 19, 1999, to hear the notification that he had the right to appeal pursuant to ILCS Supreme Court Rule 605, nor was counsel present to secure that right pursuant to ILCS Supreme Court Rule 606(b)

REASON II: PETITIONER CONTENDS THAT NEITHER THIS RESPECTED COURT NOR THE U.S. COURT OF APPEALS FOR THE 7TH CIRCUIT CAN POSSIBLY HOLD THAT THE (1) ONE YEAR TIME LIMITATION DEPICTED IN THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, (AEDPA), (EFFECTIVE APRIL 26, 1996, USHERED IN, UNDER SECTION 2244(d) OF TITLE 28 OF THE UNITED STATES CODE), APPLIES TO THIS CASE WHEN NO DEFENDANT AND NO DEFENSE COUNSEL WERE PRESENT AT THE SENTENCING HEARING, (THE FINAL STAGE OF THE CRITICAL PROCEEDINGS), TO HEAR THE RIGHT TO APPEAL AND MORE IMPORTANTLY, TO SECURE THAT RIGHT TO APPEAL

6. **SECTION 2244(d) PROVIDES:**

> A 1-year period of limitation shall apply to an application for writ of Habeas Corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of –
>
> (B) the date on which the impediment to

> filing an application created by State action in violation of the Constitution of laws of the United States is removed, **if the applicant was prevented from filing by such action**; (Emphasis Added)

7. Petitioner was prevented from appealing because the State Court failed to appoint him counsel while sentencing him *in absentia* on November 19, 1999. This act by the State Court violates not only the Illinois Legislative provision at 725 ILCS 5/115-4.1(a), it violates U.S. Constitutional Law. That refusal of due process by the State of Illinois renders the Bail Bond Forfeiture hearing held on 18 November 1999, void *ab initio*, and likewise, it renders the 19 November 1999 Sentencing Hearing *in absentia* and without counsel also void *ab initio*. This Highly Respected Court previously held in *Argersinger v. Hamlin, 407 U.S. 25, 34 (1972)* that:

> "A suspended sentence (any sentence) that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the Crime charged." (Parenthesis mine)

7. Pursuant to Section 2244(d)(1)(B), Petitioner was prevented from filing a timely appeal because of the State of Illinois failing to provide counsel at sentencing on November 19, 1999, 725 ILCS 5/115-4.1(a). The State Courts punished Petitioner for his absence not once, but 5 times: 1) On November 18, 1999, the State Court forfeited the Bail Bond of Petitioner *in absentia* and with no counsel to represent him; 2) On November 19, 1999, the State Court sentenced Petitioner to the maximum term of imprisonment that could be imposed by law, *In absentia* and without counsel to

present any mitigating factors; 3) On December 13, 2000, the sentencing prosecutor became the witness against Petitioner before a grand jury and testified falsely. The State secured an indictment for Violation of Bail Bond. 4) On December 9, 2003, the State Court convicts Petitioner of Bail Bond Violation and sentences him to an additional 30 months in prison consecutive to the 7 years imposed in this case; 5) the State Courts then prevent Petitioner from appealing the sentencing *in absentia*. The punishment doesn't end there, the Federal Courts also punish Petitioner, those Courts hold that the ADEPA 1-year time limitation prevents Petitioner from habeas corpus. That cannot be.

LEGAL ARGUMENT

9. The time for filing of the Petitioner's habeas corpus action must be tolled from November 19, 1999, he was not present for that hearing and neither was counsel. That hearing was ex-parte. The ADEPA time Limitation of 1-year can only begin to run once the State Courts have removed the Constitutional violation of sentencing Petitioner without counsel. The Petitioner does not and has never argued that the State Court could not sentence him *in absentia*. His argument is that the State Court cannot sentence him in absentia without counsel. If Petitioner filed his petition for writ of habeas corpus today, (with the understanding that he exhausts state remedies which he has done) the ADEPA time limitation still would not begin to run until the State Courts remove the Constitutional violation.

10. In each of the cited cases utilized by the Respondents in their pleadings filed through the various courts, not one case presented depicts a single defendant sentenced *in absentia* without counsel. As to why the Federal Courts did not pick up on that fact remains with their forums. Those respected courts failed to read Petitioners

pleadings and summarily dismissed and denied based on misapplication of the ADEPA. The Petitioner was absent for the sentencing, rhetorically, who stood up for Petitioner at that November 19, 1999 ex-parte sentencing? Who plead Petitioner's case for mitigating factors? Who was present to receive the notification of the right to appeal (ILCS Supreme Court Rule 605)? And more importantly, who was present to secure that right to appeal for Petitioner (ILCS Supreme Court Rule 606)? All the Judge had to do was say: "Mr. or Ms. Public Defender, you now represent Mr. Weilburg for the purpose of this hearing." Surely there were Public Defenders somewhere in the Court Building on those November 18 and 19, 1999 dates. The Illinois Legislature wanted the right to be represented protected for absent defendants. At 725 ILCS 5/115-4.1(a) that State Body provided: **"...the absent defendant must be represented by either retained or appointed counsel..."** The State Court followed the letter of the law when it sentenced Petitioner to 7 years in prison, but, that Court disregarded the Law when it sentenced Petitioner without counsel *in absentia*..

11. In 1948, this respected Court held in the matter of *Townsend v. Burke, 334 U.S. 736*, that the absence of counsel during sentencing after a plea of guilty coupled with 'assumptions concerning his criminal record which were materially untrue' deprived the defendant in that case of due process. Mr. Justice Jackson there stated in conclusion: "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." Id., at 741. The Defendant in *Townsand, supr*a was present. In the instant case, neither the Petitioner nor counsel was present. In the matter of *Moore v. Michigan, 355 U.S. 155, (1957),*

where a denial of due process was found when the defendant did not intelligently waive counsel before entering a plea of guilty, this Court emphasized the prejudice stemming from the absence of counsel at the hearing on the degree of the crime following entry of the guilty plea and stated: "The right counsel is not a right confined to representation during the trial on the merits." Id., at 160. The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of Counsel without affording an opportunity for hearing on "critically important" decision is tantamount to denial of counsel. The sentencing stage of the criminal process is as critical as the trial stage, perhaps more so, and the right to counsel should be protected at sentencing.

12. In the matter of *Scott v. Illinois, 440 U.S. 367 (1980)*, this Honorable Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require . . . that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id., at 373-374. Illinois did not adhere to the ruling by this Court in *Scott, supra* when deciding to sentence Petitioner *in absentia* without counsel. Therefore, with the sentencing of this Petitioner to the maximum term of 7 years, or any term of imprisonment on November 19, 1999, with no counsel to represent him, is a blatant act of indifference to this Honorable Court's decisions in Scott, supra, (See also Mempa v. Rhay, 389 U.S. 128 (1967))

13. This Petition for Certiorari is requested to secure and maintain uniformity with this Honorable Courts previous decisions regarding the right to Counsel in the matters of: *Gideon v. Wainright, 372 U.S. 335 (1963*, **"...the right to counsel applies to every stage of the criminal process..."**; *Hamilton v. State of Alabama, 368 U.S. 52 (1961)*, **"...at**

certain arraignments..."; *Douglas v. People of the State of California, 372 U.S. 353, (1963)* **"...on appeal..."** and applicable to Petitioner's case herein, *Linkletter v. Walker, 381 U.S. 618 (1965)* **"...the right to counsel is also extended to sentencing..."** There is also the element of the legality of ex-parte sentencing in absentia, double jeopardy punishments for a single act and the right to appeal. All of which apply to this matter.

14. In Petitioner's case, the basic issue is whether the record shows that the Petitioner understood that he had a right to be represented by counsel and if so, whether he knowingly and intelligently waived that right. *People v. Hessenaur, (1970) 45 Ill.2d 63,67, 256 N.E.2d 791* and ILCS Supreme Court Rule 401. Petitioner could not have waived that right on November 18, 1999, the Bond Forfeiture Hearing or November 19, 1999, the Sentencing hearing because he wasn't present for those hearings. There is nothing in the record of this case that reflects that Petitioner waived his right to counsel for either the Bond Forfeiture Hearing or the Sentencing Hearing. In fact, on September 3, 1999, the Petitioner pointedly informed the Court that he desired Counsel for sentencing and on September 30, 1999, the State pleaded with the Court to appoint counsel. The Court denied that request and in so doing, denied Petitioner due process of law. See also *People v. Partee*, 530 N.E.2d 460, (1988) and, *People v. Dupree*, 793 N.E.2d 31 (2003) In both these cases, the Defendants were represented by attorneys. Both had the right to appeal, yet, Petitioner is not allowed to appeal because he had no attorney at the *in absentia* sentencing hearing.

REASONS FOR GRANTING THE WRIT

REASON I: THE ILLINOIS STATE COURTS; THE U.S. DISTRICT COURT AND THE 7TH CIRCUIT COURT OF APPEALS CANNOT HOLD THAT A DEFENDANT WAS APPRISED OF HIS RIGHT TO APPEAL, 725 ILCS S.CT. RULE 605 DURING SENTENCING WHERE NO DEFENDANT AND NO DEFENSE COUNSEL WERE PRESENT AT THE SENTENCING HEARING.

1. The Petitioner notified the trial court on September 3, 1999, that he desired the guiding hand of counsel to represent him at sentencing.

2. Illinois Statutory Law at 725 ILCS 5/115-4.1(a) provides that all criminal defendants must be represented in order for proceedings to commence *in absentia* by either retained or appointed counsel.

3. This Petitioner was not present for the ex-parte Bond Forfeiture Hearing held on November 18, 1999, nor was he represented by counsel at that hearing, yet the Court took his Bond Money.

4. This Petitioner was not present for the ex-parte sentencing hearing held on November 19, 1999, nor was he represented by counsel, yet the Court sentenced him to the maximum term of imprisonment that could be imposed by law of 7 years.

5. This Petitioner was not present for the ILCS S.Ct. Rule 605 notification that he had the right to appeal on November 19, 1999, nor was counsel appointed to secure that right pursuant to ILCS S.Ct. Rule 606(b).

<u>REASON II:</u> THE ILLINOIS STATE COURTS, THE U.S. DISTRICT COURT AND THE 7TH CIRCUIT U.S. COURT OF APPEALS CANNOT HOLD THAT THE TIME LIMIT DEPICTED IN 725 ILCS S.CT. RULE 606(b), IN WHICH TO FILE AN APPEAL (30 DAYS AFTER FINAL JUDGMENT) BEGAN TO RUN ON NOVEMBER 19, 1999, WHEN NEITHER THE PETITIONER NOR COUNSEL FOR THE PETITIONER WERE PRESENT AT THAT SENTENCING HEARING TO SECURE THE RIGHT TO APPEAL.

6. The 6th Constitutional Amendment secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process, see, e.g., *Maine v. Moulton, 474 U.S. 159, 170.* the Petitioner asserts that if that Constitutional guarantee of the right to counsel is violated by the State, any trial or other critical stage of the proceedings commenced without either the defendant or counsel for the defendant present, especially at the sentencing, must be voided *ab initio*. Any right to appeal that was provided by the court, with no defendant or defense counsel present, falls on NO EARS and the warning or right to appeal cannot be provided to the absent defendant, or through an absent representative. No appeal right given to the defendant, no counsel to secure that right to appeal.

<u>REASON III:</u> THIS RESPECTED COURT, THE 7TH CIRCUIT U.S. COURT OF APPEALS AND THE U.S. DISTRICT COURT CANNOT HOLD THAT THE ONE (1) YEAR TIME LIMITATION DEPICTED IN THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA), (EFFECTIVE APRIL 26, 1996, USHERED IN, UNDER SECTION 2244(d) OF TITLE 28 OF THE UNITED STATES CODE), TAKES EFFECT WHEN NO DEFENDANT OR DEFENSE

COUNSEL IS PRESENT AT THE SENTENCING HEARING, (THE FINAL STAGE OF THE CRIMINAL PROCEEDINGS), TO HEAR THE RIGHT TO APPEAL AND MORE IMPORTANTLY, WHERE NO COUNSEL IS PRESENT TO SECURE THE RIGHT TO APPEAL.

SECTION 2244(d) PROVIDES:

> A one-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of -
>
> **(B) the date on which the impediment to filing an application created by state action in violation of the constitution of laws of the United States is removed, if the applicant was prevented from filing by such action;**

7. Petitioner's conviction can never be final because the State Court sentenced him *in absentia* and without the guiding hand of counsel in violation of 725 ILCS 5/115-4.1(a) and more importantly, the 6th U.S. Const. Amend. That blatant refusal of due process by the State Court renders the bond forfeiture hearing void *ab initio,* as well as the sentencing hearing held on November 18, 19, 1999. Both hearing were ex-parte in violation of every know law and precedent, beginning *with Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 799, 93 A.L.R.2d 733 (1963).* Petitioner was not apprised of his right to appeal on November 19, 1999, at the ex-parte sentencing, nor was he provided the right to appeal because the State Court failed to provide him with appointed counsel who would have secured that right to appeal.

CONCLUSION

It is not too often that a citizen of these United States is provided the privilege of addressing this Honorable Court, the Highest Court in the land. What a fine Country that allows one of its citizens that opportunity. Quite frankly, the odds against this respected Court even entertaining this Petition are two, slim and none. Petitioner was informed by the Clerk that there are over 10,000 petitions submitted and less than a hundred are ruled upon.

Nonetheless, the Petitioner is appreciative for this Courts forbearance of his less than professional presentation. The facts of this case are undisputable. Petitioner was sentenced *in absentia* without counsel on November 19, 1999.

The U.S. Constitutional 6th Amendment was trampled under foot when the Illinois State Court decided to sentence Petitioner without Counsel. This Court must not allow that to continue without redress.

The Petitioner was in error for not appearing in the Illinois State Court on September 30, 1999 for sentencing. But, even an absent defendant retains all the rights guaranteed by the U.S. Constitution, the Constitution of the State of Illinois, and Statutes of the State of Illinois and the Rules of the Illinois State Courts. All these factors must come into play as if the defendant were present.

These factors, these Constitutional Rights, and these Statutory Rights did not come into play in Petitioner's case now before this Honorable Court. Should this Court decline to rule upon this case, a new door will be opened, the door that says that any Court my hold formal criminal proceedings without the defendant present and without the guiding hand

of counsel. That is a message that cannot, no, must not be sent to the lower courts. The lower courts will have carte blanche to hold proceedings *in absentia* and without counsel at their whim. Then, order the defendant's arrest and immediate transportation to prison or other punishment as deemed unjust denying appeals and habeas corpus relief.

This Petitioner does not believe that the framers of the U.S. Constitution or the past Supreme Court Jurists would alleviate the Constitutional guarantee to the guiding hand of counsel in exchange for imprisoning citizens because they are absent from court.

There is no genuine question that can be more important to this Honorable Court then the question of: "Am I entitled to the guiding hand of counsel for all stages of criminal proceedings lodged against me?" In Petitioner's case it was the Bond Forfeiture Hearing held on November 18, 1999, *in absentia* and without counsel, and the Sentencing Hearing held on November 19, 1999, *in absentia* and without counsel.

Tomorrow, it will be arraignments, trials and other hearings held *in absentia* and without counsel because the Federal Courts chose to apply the ADEPA even though Petitioner had no notice of the right to appeal or no attorney to secure the right to appeal. State Courts can delay arresting the absent defendants so the ADEPA time limitation of one-year expires. That cannot be what the frames of the Constitution meant when they provided that all criminal defendants must be represented by counsel. That cannot be what this respected Court held in prior precedents, nor can it be what this Court allows today.

Both the State Courts and the Federal Courts have acknowledged that Petitioner was sentenced *in absentia*. But, both these forums have dismissed the fact that Petitioner was sentenced *in absentia* without counsel.

Within its opinion (Appendix A) the District Court is confused with dates. The Petitioner was sentenced on November 19, 1999, not October 30, 1999. Again, the District Court failed to acknowledge that Petitioner was sentenced in absentia and, more importantly, without counsel.

If that is not a Constitutional issue, then perhaps the Petitioner doesn't have the same copy of the Constitution that the U.S. District Court for the Central District of Illinois or the 7th Circuit U.S. Court of Appeals, peruse. The Copy of the U.S. Constitution Petitioner has dictates that no criminal procedure can be weighed against an indigent defender without the guiding hand of counsel. This respected Court emphasized that a criminal defendant is entitled to the guiding hand of counsel in all critical stages of the criminal process. This Petitioner didn't see any exception to his case.

RESPECTFULLY SUBMITTED this 26th day of September, 2007.

By: Daro Weilburg
DARO WEILBURG
In propria personam

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

DARO WEILBURG,	)	
Petitioner,	)	No. 06-3125
-vs-	)	
JESSE MONTGOMERY,	)	
Respondent.	)	
	)	

OPINION

RICHARD MILLS, U.S. DISTRICT JUDGE:

This case is before the Court on the Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Pursuant to the Court's direction, the Attorney General of Illinois has filed an answer to the Petitioner's petition for a writ of habeas corpus. Upon review of the petition, the court concludes that an evidentiary hearing is not warranted.

1Gregory Sims, the Warden at the facility where the Petitioner was previously incarcerated, was initially named as the Respondent in this action. The Petitioner has been released from prison and is currently serving a term of mandatory supervised release. Jesse Montgomery, the Deputy Director of the Parole Division for the Illinois Department of Corrections, is therefore now the proper Respondent in this action. Accordingly, Mr. Montgomery is hereby substituted as the Respondent in this habeas action. See Fed. R. Civ. P. 25(d)(1); see also Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996) (observing that if the petitioner is on parole, the proper respondent is the parole board or its equivalent)

I. BACKROUND

On August 29, 1997, following a jury trial, Petitioner Daro Weilburg was convicted in the Circuit Court of Winnebago County of the offense of theft over $10,000.00. The Petitioner failed to appear for his September 30, 1999 sentencing hearing. Accordingly, his bond was forfeited and he was sentenced in absentia to a term of seven years' imprisonment.

The Petitioner was subsequently indicted for the offense of violation of bail bond, based on his failure to surrender on the theft conviction. He was sentenced to serve thirty months' imprisonment, to run consecutively to the sentence imposed for theft.

The Respondent alleges that the Petitioner unsuccessfully challenged on direct appeal his conviction for violation of bail bond. He also filed a federal habeas corpus petition challenging that conviction. These challenges were unsuccessful. The Petitioner disputes the assertion that he challenged in federal court the violation of bail bond conviction. He claims those proceedings were related to the Interstate Agreement on Detainers and the Uniform Criminal Extradition Act.

The Respondent alleges that although the Petitioner never perfected an appeal from his theft conviction, he did file several motions in the state appellate court regarding that conviction. Prior to sentencing, the Petitioner filed a motion in the appellate court seeking release from confinement and the appointment of counsel. On November 14, 1997*, the Illinois Appellate Court, Second District, entered an order

*The Respondent notes that because the Petitioner was not sentenced until September 30, 1999, his motion filed in the appellate court was filed prior to the final date of his conviction.

denying that motion on the basis that there was no perfected appeal, and the Petitioner had failed to cite any proper rule under which that court could obtain jurisdiction. On September 30, 2003, Petitioner filed a motion to file a late notice of appeal with the state appellate court, which was denied on October 21, 2003. The Petitioner disputes the Respondent's assertion that he filed a late notice of appeal as to the theft conviction. He argues that because he was not informed of his right to appeal, the time in which to file a notice of appeal was tolled.

The Respondent next alleges that notwithstanding, the Petitioner's unsuccessful attempts to perfect an appeal, on November 3, 2005, he filed an "opening brief for Defendant-Appellant" from his theft conviction in the state appellate court, wherein he raised the following issues: (1) the State of Illinois violated Petitioner's speedy trial rights; (2) the prosecutor prompted his first witness to inform the jury that Petitioner had been in prison before; (3) the prosecutor tampered with a witness' testimony; (4) the prosecutor presented fictitious invoices; (5) he received ineffective assistance of counsel when counsel neglected to use a peremptory challenge to exclude a juror who had a close association with Petitioner; (6) he received ineffective assistance of counsel when counsel failed to challenge the fictitiously addressed invoices; (7) the trial court erred by not holding an evidentiary hearing to voir dire a juror about his association with the Petitioner; (8) the trial court erred by sentencing him in absentia; (9) the state withheld exculpatory evidence; and (10) the State was guilty of selective prosecution when it decided not to prosecute certain individuals for the same theft for which Petitioner was convicted.

On December 5, 2005, the State filed a motion to

dismiss the Petitioner's appeal on the ground that a timely notice of appeal was never filed as required by Illinois Supreme Court Rule 606(b). On December 12, 2005, the Petitioner filed an objection to the Petitioner's motion to dismiss. On December 21, 2005, the Illinois Appellate Court, Second District, granted the State's motion to dismiss for failure to comply with Rule 606(b).

The Petitioner filed a Petition for leave to appeal ("PLA") in the Illinois Appellate Court. On May 24, 2006, the Illinois Supreme Court denied the PLA. the Respondent notes that the Petitioner never filed a Post-Conviction petition challenging his theft conviction. the Petitioner contends that he was denied the right to puruse an appeal.

On June 1, 2006, the Petitioner filed this petition for writ of habeas corpus challenging his theft conviction. In his section 2254 petition, the Petitioner alleges: (1) his right to a speedy trial was violated; (2) trial counsel was ineffective for not challenging a juror for cause or using a peremptory challenge, and the trial court erred in refusing to conduct further voir dire of that juror once it became know that he and the Petitioner knew each other; (3) prosecutorial misconduct occurred when the prosecutor elicited testimony that Petitioner had been in jail before; (4) the trial court erred in allowing a State's witness to twice testify; (5) the State withheld certain exculpatory information; (6) trial counsel was ineffective for failing to insure that Petitioner receive a speedy trial; (7) the trial court erred in admitting certain evidence; (8) the trial court improperly sentenced Petitioner in absentia; and (9) the failure of the State to issue an arrest warrant in Petitioner's absence from his trial proceedings.

Pursuant to the Court's Order, the Respondent filed an answer to the Petition under Section 2254. The Petitioner

then filed a Motion to stike the Respondents answer. That Motion basically serves as a reply brief to the Respondents answer.

II ANALYSIS

The Respondent contends that Petitioner's habeas corpus petition is time-barred and should be dismissed with prejudice for that reason. The Antiterrorism and Effective Death Penalty Act ("ADEPA"), effective April24, 1996, established under 28 U.S.C. Section 2244(d)(1) a one-year limitations period for habeas corpus actions under 2254. Section 2244(d)(1) provides:

> A 1-year period of limitation shall apply for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of –
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking review;
> (B) the date on which the impediment to filing an application created bt State action in violation of the Constitution of laws of the United States is removed, if the applicant was prevented from filing by such action;
> (C) the date on which the constitutional right has asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been been discovered through the exercise of due diligence.
> 28 U.S.C. Section 2244(d)(1)

The Respondent asserts that the Petitioner's conviction became final on October 30, 1999, thirty days after he was sentenced in absentia. Although the Petitioner did not appeal from his September 30, 1999, judgment of conviction, he is afforded thirty days from which he could have filed his notice of appeal. ILCS S.Ct. Rule 606(b). Accordingly, the Respondent alleges that the time for the filing of the Petitioner's section 2254 petition began to run on October 30, 1999, when the time for seeking direct review expired. See 28 U.S.C. Section 2244(d)(1)(A). the Respondent contends, therefore, that his habeas petition was due on October 30, 2000, and that the instant petition, which was filed on June 1, 2006, is therefore untimely.

The Respondent further alleges that although the Petitioner made some attempts at perfecting a direct appeal from his conviction, including a motion to file a late notice of appeal, the appellate court denied the Petitioner's filings and dismissed his appeal. The Respondent contends that because the Petitioner never properly filed a state appeal, the judgment was final on October 30, 1999, thirty days after he was sentenced, and the time period was not tolled thereafter. See 28 U.S.C. Section 2244(d)(1).

As for the Respondent's timeliness argument, the Petitioner argues only that the ADEPA did not become effective until April 24, 1996. Because the Petitioner's case began in 1994 when the theft occurred, he argues that the application of the AEDPA "would be barred expost facto."

The Petitioner's argument is without merit. The fact that the crime occurred before the AEDPA was enacted is irrevelent for the purposes of the statute of limitations. AEDPA is concerned with when the conviction became final, not with when the criminal act was committed. Even if the Petitioner's conviction had become final prior to

April 4, 1996, he still would have been subject to the one-year grace period for timely petitions for review in federal court, and the petition would have been timely only if it was filed by April 24, 1997. See Araujo v. Chandler, 435 F.3d 678, 680 (7th Cir. 2005).

The record shows that the Petitioner attempted to file a couple of late notices of appeal with respect to his theft conviction. However, those attempts were unsuccessful. Pursuant to Illinois Supreme Court Rule 606(b), the Petitioner had until October 30, 1999 to file a notice of appeal. His petition under section 2254 was due one year later. Although requests for extensions of the appeal period are permitted, see Illinois Supreme Court Rule 606(c), this does not serve to continue to toll the statute of limitations period for filing a section 2254 petition. Otherwise, the one-year limitations period of section 2244(d)(1) would mean nothing because a litigant could always seek to extend this period be seeking leave to file a late notice of appeal in state court.

The Petitioner's section 2254 petition was untimely and there is no basis for equitable tolling. The Court will therefore dismiss his habeas corpus petition. Having concluded that the Petition is untimely, the Court need not address the Respondent's alternative argument that the Petitioner has procedurally defaulted all of his claims.*

It is worth noting, however, that this would also likely be an appropriate basis to dismiss the petition. The Petitioner baqses his argument in large part on the trial court's failure to advise him of his appellate rights. However, the Petitioner was not advised of his appellate rights because he did not appear at sentencing. He would have been so advised if he had appeared.

The Court notes that the Petitioner has filed several other motions, some of which pertain to his request to travel between the States of Arizona and Illinois without hinderance from the paroling authorities of those States. this Court is authorized to consider an individual's application for a writ of habeas corpus "pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. Section 2254. The issues concerning the terms of an individual's probation or parole are matters for the court which imposed the sentence that he is serving.

ERGO, the Petitioner's petition under 28 U.S.C. Section 2254 for a writ of habeas corpus [d/e 1] is DENIED. All other motions are DENIED AS MOOT. The case is Closed.

ENTER: December 5, 2006

FOR THE COURT

/s/ Richard Mills
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

DARO WEILBURG,	)	
Petitioner,	)	No. 06-3125
-vs-	)	
JESSE MONTGOMERY,	)	
Respondent.	)	
	)	

OPINION

RICHARD MILLS, U.S. DISTRICT JUDGE:

In an Order entered on December 5, 2006, the Court denied the Petitioner's petition for writ of habeas corpus under 28 U.S.C. Section 2254. On January 26, 2007, the Petitioner's motion for amendment from judgment or in the alternative motion for relief from judgment was denied.

This Case is now before the Court on the Petitioner's motion for the issuance of a certificate of appealability.

Pursuant to 28 U.S.C. Section 2253© and Federal Rule of Appellate Procedure 22(b), the District Court must issue a certificate of appealability authorizing the appeal of the denial of a petitioner fro a writ of habeas corpus under section 2254. A certificate of appealability may issue only if the Petitioner makes a substantial showing of the denial of a constitutional right. The Court declines to issue a certificate of appealability.

ERGO, the Petitioner's motion for the issuance of a certificate of appealability [d/e 22] is DENIED.

ENTER: February 14, 2007

FOR THE COURT

/s/ Richard Mills
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 11, 2007

Before

Honorable ILANA DIAMOND ROVNER, Circuit Judge

Honorable DIANE S. SYKES, Circuit Judge

No. 07-1360

DARO C. WEILBURG, *Petitioner-Appellant,*	)	Appeal from the United States District Court for Central District of
v.	)	Illinois
JESSE MONTGOMERY, *Respondent-Appellee.*	)	No. 06-3125 Richard Mills, *Judge.*

ORDER

No judge of the court having called for a vote on the Petition for Rehearing En Banc filed by Petitioner-Appellant on May 15, 2007, and all of the judges on the original panel having voted to deny same,

IT IS HEREBY ORDERED that the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 25, 2007
Decided April 25, 2007

Before

Hon. ILANA DIAMOND ROVENOR, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 07-1360

DARO C. WEILBURG, *Petitioner-Appellant,* v.	Appeal from the United States District Court for the Central District of Illinois. No. 06 C 3125
JESSE MONTGOMERY, *Respondent-Appellee.*	Richard Mills, *Judge*

ORDER

Daro Weilburg has filed a notice of appeal from the denial of his under 28 U.S.C. Section 2254, and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. Section 2253©(2)

Accordingly, the request for a certificate of appealability is DENIED.